Supreme Court, U.S.
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No. 02-194

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

WILLIAM J. FLEMING,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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The government erroneously argues that the decision below "does not conflict with the decision of any other court of appeals." Resp. Br. at 10. In *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974), the court held that separation of a technician "for cause" under 32 U.S.C. § 709 is subject to judicial review. Contrary to the government's assertion, Resp. Br. at 14, n.4, the *Chaudoin* court upheld a statutory, not a constitutional, claim. The court held the technician's separation was not "for cause" within the meaning of the statute and implementing regulations. 494 F. 2d at 1330-1331. The government also is incorrect when it asserts that the claim in *Chaudoin* was "not against the United States." Resp. Br. at 14, n.4. The court expressly held that the defendant was "an agency or an agent of the United States." 494 F. 2d at 1330. In *Diluigi v. Kafkalas*, 584 F.2d 22, 23 n. 2 (3rd Cir. 1978), moreover, the court held that the Back Pay Act, 5 U.S.C. § 5596(b)(1), gives the district court Little Tucker Act jurisdiction, 28 U.S.C. § 1346(a)(2), to review the separation of a title 32 technician.[1]

The government erroneously argues that the *Chaudoin* and *Diluigi* decisions are distinguishable because they predate "the 1990 Civil Service Amendments" which

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[1] In *Diluigi* the court ruled for the government on the merits, finding that under valid regulations the technician was a probationary employee who could be separated without "cause." Contrary to the government's brief at 14-15, which quotes the court out of context, the *Diluigi* court did not hold that all excepted service title 32 technicians lack tenure and may be separated without "cause." Rather, the court noted that the legislative history of the statute states that excepted service title 32 technicians acquire "career status" after serving one year. 584 F.2d at 25. The court held "the clear import of the termination for cause provision was to accord all technicians an assurance of continuing employment similar to that given other federal employees." *Id.*

excluded title 32 technicians from title 5 adverse action review provisions. Resp. Br. at 14. The express statutory exclusion of title 32 technician adverse actions from title 5 review provisions has been in effect since 1968, when Congress first created the title 32 technician program. National Guard Technicians Act of 1968, P.L. 90-486, 82 Stat. 755 (August 13, 1968) (§§ 709(e)(5) and 709(f); *see Chaudoin v. Atkinson*, 494 F.2d 1323, 1325 n. 1 (3rd Cir. 1974)). The legislative history of the 1990 Civil Service Amendments confirms that the 1990 amendments made no change in this regard. H.R. Rep. No. 101-328 (1st Sess. 1989) at 5, 7. When the 1990 amendments were enacted, it was well established that title 32 technician separations are subject to judicial review in district court, and by suit in the Court of Claims under the Back Pay Act. *Polos v. United States*, 621 F.2d 385 (Ct. Cl. 1980); *Diluigi v. Kafkalas*, 584 F.2d 22 (3rd Cir. 1978); *Morris v. McCaddin*, 553 F.2d 866 (4th Cir. 1977); *Chaudoin v. Atkinson*, 494 F.2d 1323 (3rd Cir. 1974); *Davis v. Vandiver*, 494 F.2d 830 (5th Cir. 1974). Nothing in the text or legislative history of the 1990 amendments provides any evidence--let alone the required "clear and convincing evidence," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)--that Congress in 1990 intended to deprive title 32 technicians of their previously-recognized right to judicial review.

Nor can it be said that the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* (October 13, 1978) (CSRA), provides clear and convincing evidence that Congress intended to take away title 32 technicians' judicial review rights. As we pointed out in our petition, and the government's brief does not dispute, the 1978 CSRA "did not mention title 32 technicians at all." Pet. at 10. None of the factors which caused the Court to infer congressional intent to preclude review in *Fausto v. United*

States, 484 U.S. 439 (1988), applies to title 32 technicians. Pet. at 10-11.

Contrary to the government's brief at 17, judicial review of title 32 technician separations was not part of the "patchwork of review mechanisms" that Congress intended to replace in 1978. The "civil service system" that the CSRA "overhauled," Resp. Br. at 17, *quoting Fausto*, 484 U.S. at 443, was the title 5 system, not the title 32 adverse action system. The latter is outside title 5 and always has been. Given the consistent exclusion of title 32 technicians from the title 5 adverse action review system, changes to the title 5 system in 1978, making no mention of title 32 technicians, do not support an inference, let alone provide clear and convincing evidence, that Congress intended to remove judicial review from the title 32 system.[2]

Contrary to the government's brief at 11-12, *Fausto* did not hold that the Court of Claims was no longer an "appropriate authority" to determine whether *any* "personnel action" was "unwarranted or unjust" within the meaning of the Back Pay Act. The court below properly has rejected such an interpretation of *Fausto*. *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999) (Court of Federal Claims an "appropriate authority" under Back Pay Act to redress violation of Compressed Work Schedules

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[2] Like title 32 technicians, foreign service employees are not included in the title 5 adverse action review system; and the 1990 Civil Service Amendments expressly excluded them, as well, from that system. 5 U.S.C. § 7511(b)(6). This exclusion, however, supports no inference that Congress intended to eliminate judicial review from the foreign service system. Like the title 32 system, the foreign service system, which includes judicial review, 22 U.S.C. §§ 4131-4140, is not part of the "patchwork" that Congress intended to replace when it enacted the CSRA.

Act); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994) (same; pay unlawfully withheld for taxes).

In *Fausto*, the Court held that, after the CSRA, the Court of Claims no longer was an "appropriate authority" to review those personnel actions that the CSRA intended not to be judicially reviewed at all. The Court of Federal Claims, however, is an appropriate authority to address a personnel action that has caused loss of pay where there is no clear and convincing evidence of congressional intent to preclude judicial review of that action. *Worthington*; *Romero*. *See also*, *Zervas v. United States*, 26 Cl. Ct. 1425, 1428 (1992) (Court of Federal Claims an "appropriate authority" under Back Pay Act to redress unlawful denial of grade and pay retention benefits); *Bailey v. United States*, 52 Fed. Cl. 105, 113 (2002) (same; unlawful denial of travel reimbursements).

Section 709(f)(4) of title 32, saying the "right to appeal" does "not extend beyond the adjutant general," is not clear and convincing evidence of congressional intent to preclude judicial review. Section 709(f)(4) limits administrative review; it does not preclude judicial review. *Chaudoin v. Atkinson*, 494 F.2d 1323, 1327 n. 5 (3rd Cir. 1974). The government does not argue that the *Chaudoin* court incorrectly decided this point. Rather, like the court below, the government argues only that the 1990 Civil Service Amendments and the holding in *Fausto* preclude judicial review of technician separations. Resp. Br. at 12-14. We have shown above, however, and in our petition, that the government's argument is incorrect.

Respectfully submitted,

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